



COURT REPORTING

LEGAL VIDEOGRAPHY

VIDEOCONFERENCING

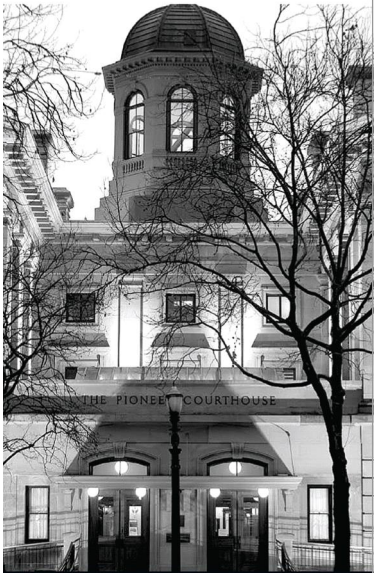
TRIAL PRESENTATION

MOCK JURY SERVICES

LEGAL TRANSCRIPTION

COPYING AND SCANNING

LANGUAGE INTERPRETERS



NAEGELI
DEPOSITION & TRIAL



(800) 528-3335

NAEGELIUSA.COM

**UNITED STATES DISTRICT COURT
DISTRICT OF OREGON PORTLAND DIVISION**

DON'T SHOOT PORTLAND, et al.,

Plaintiffs,

vs.

Case No. 3:20-cv-00917-HZ

CITY OF PORTLAND, a municipal
Corporation,

Defendant.

REMOTE DEPOSITION BY VIDEO CONFERENCE OF

LIEUTENANT FRANZ SCHOENING

**TAKEN ON
THURSDAY, SEPTEMBER 23, 2021
9:05 A.M.**

**111 SOUTHWEST SECOND AVENUE
PORTLAND, OREGON 97204**

**Dec of Merrithew
Exhibit 4 - Page 1 of 44**

APPEARANCES BY VIDEOCONFERENCE (OR TELECONFERENCE)

APPEARING ON BEHALF OF THE PLAINTIFF,

DON'T SHOOT PORTLAND, et al:

JESSE MERRITHEW, ESQUIRE

LEVI MERRITHEW HORST PC

610 SOUTHWEST ALDER STREET, SUITE 415

PORTLAND, OR 97205

(971) 229-1241

(971) 544-7092 (Fax)

jesse@lmhlegal.com

J. ASHLEE ALBIES, ESQUIRE

MAYA RINTA, ESQUIRE

ALBIES AND STARK LLC

ONE SW COLUMBIA STREET, SUITE 1850

PORTLAND, OR 97204

(503) 308-4770

(503) 427-9292 (Fax)

ashlee@albiesstart.com

maya@albiesstark.com

1 **APPEARANCES BY VIDEOCONFERENCE (OR TELECONFERENCE)**

3 **APPEARING ON BEHALF OF THE DEFENDANT,**

4 **CITY OF PORTLAND:**

5 NAOMI SHEFFIELD, ESQUIRE

6 ROBERT YAMACHIKA, ESQUIRE

7 J. SCOTT MOEDE, ESQUIRE

8 **PORTLAND CITY ATTORNEY'S OFFICE**

9 1221 SOUTHWEST FOURTH AVENUE, SUITE 430

10 PORTLAND, OR 97204

11 (503) 823-4047

12 (503) 823-3089 (Fax)

13 naomi.sheffield@portlandoregon.gov

14 rob.yamachika@portlandoregon.gov

15 scott.moede@portlandoregon.gov

17 **ALSO PRESENT:**

18 Clair Warnock, City of Portland Paralegal

19 Vincent Guerrera, Videographer

INDEX

Page

EXAMINATION BY MR. MERRITHEW

7

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

EXHIBITS

Exhibit

Page

(NONE MARKED)

1 **REMOTE DEPOSITION BY VIDEOCONFERENCE OF**
2 **LIEUTENANT FRANZ SCHOENING**
3 **TAKEN ON**
4 **THURSDAY, SEPTEMBER 23, 2021**
5 **9:05 A.M.**

6
7 **THE VIDEOGRAPHER:** We are on the record.
8 The time is 9:05 a.m. The date is September 23rd,
9 2021. This is the beginning of the deposition of
10 Lieutenant Franz Schoening. Will -- the case
11 caption is Don't Shoot Portland versus City of
12 Portland.

13 Will counsel, please introduce yourselves
14 and state who you represent.

15 **MR. MERRITHEW:** My name is Jesse
16 Merrithew, counsel for the plaintiffs in this
17 action.

18 Also present remotely are Ashlee Albies
19 and Maya Rinta, who are also counsel for the
20 plaintiff.

21 **MS. SHEFFIELD:** My name is Naomi
22 Sheffield. I'm attorney for the City of Portland,
23 and also present for the City of Portland is Scott
24 Moede and Robert Yamachika.

25 **THE VIDEOGRAPHER:** Our court reporter will

1 swear in the witness.

2 **THE REPORTER:** Lieutenant Schoening, will
3 you please raise your right hand.

4 Do you solemnly swear or affirm under the
5 penalty of perjury that the testimony you're about
6 to give will be the truth, the whole truth, and
7 nothing but the truth?

8 **THE DEPONENT:** I do.

9 **THE VIDEOGRAPHER:** You may now proceed,
10 counsel.

11 **MR. MERRITHEW:** Thank you.

12 **FRANZ SCHOENING**, having been first duly sworn, was
13 examined, and testified as follows:

14 **EXAMINATION**

15 **BY MR. MERRITHEW:**

16 **Q.** Lt. Schoening, first of all, I want to
17 make sure I'm pronouncing your name correctly. Is
18 Schoening correct?

19 **A.** That is correct.

20 **Q.** I want to try and get an understanding of
21 what we're here to do today and make sure that
22 understanding is shared between the two of us.

23 What is your understanding of the topics
24 that you're going to testify about today?

25 **A.** I was provided a list of the topics by the

1 city attorney's office. There are a series of
2 questions. Mostly I'm going to be answering
3 questions related to the training for crowd control
4 and the use of riot control agents by the Portland
5 Police Bureau.

6 **Q. Okay. And do you understand that today's**
7 **deposition is not -- it's not about Lt. Schoening's**
8 **knowledge. It's -- you're speaking for the City of**
9 **Portland when you give answers here today.**

10 A. I do.

11 **Q. And do you believe that you are prepared**
12 **to do that?**

13 A. I believe so.

14 **Q. And do you consent to give testimony on**
15 **behalf of the City of Portland today?**

16 A. I do.

17 **Q. I'd like to get an understanding of what**
18 **you did to prepare for today's deposition in order**
19 **to gather the necessary knowledge that was within**
20 **the scope of the City of Portland.**

21 **Can you tell us what documents you**
22 **reviewed in preparation for the deposition here**
23 **today?**

24 A. I have reviewed training materials, Rapid
25 Response Team and crowd control training materials

1 A. Sure. So you said a couple of things I
2 want to touch on there. We do deliver additional
3 training on the long baton, both at the State of
4 Oregon course and potentially during in-service
5 training. My answer earlier was there is no
6 prohibition against using that tool prior to
7 attending the course. Just to clarify.

8 Q. Gotcha.

9 A. To your next question, can you ask that
10 again, please?

11 Q. Sure. My question was: First, can you
12 define what the bureau means by distraction devices?
13 What's in that category?

14 A. So there is no written definition of
15 distraction device in our policy under Directive
16 1010. Generally, industry standards, you know, a
17 distraction device is a device that produces a loud
18 noise, a flash of light. There are a variety of
19 ways they are constructed or manufactured.

20 The Rapid Response Team uses three types
21 of distraction devices. They use what's commonly
22 referred to as the rubber ball distraction device.
23 There are two types of rubber ball distraction
24 device. One carries a payload of small rubber
25 projectiles that serve as an area-impact munition,

1 and the other contains no payload other than a small
2 amount of inert powder.

3 We also have a non-bursting, aluminum-body
4 distraction device. That's a small aluminum body
5 and inside is the charge that delivers the flash and
6 sound, but it does not burst.

7 Q. Okay. Is -- would the smoke canisters
8 that are deployed by RRT be in a different category?

9 A. Yes.

10 Q. What category would that be?

11 A. That would be obscurant.

12 Q. Okay. All right. And does -- during the
13 2020 protests, did RRT use any aerial distraction
14 devices?

15 A. No.

16 Q. Okay. So for an RRT member to carry and
17 deploy distraction devices, was it -- is there any
18 additional training necessary before they'd be
19 authorized to do that?

20 A. They would be required to attend the
21 Grenadier Operator's course.

22 Q. Okay. So only the grenadiers are
23 authorized to carry and deploy those with RRT; is
24 that right?

25 A. Grenadiers and supervisors who both attend

1 the Grenadier's Course.

2 Q. All right. What about the 40-millimeter
3 launchers? In order to -- for an RRT member to
4 carry and deploy 40-millimeter launcher, what
5 additional training, if any, are they required to
6 attend?

7 A. So a grenadier or a supervisor would be
8 authorized to carry the 40-millimeter launcher.
9 Prior to that, they'd be required to attend the
10 Grenadier Certification Course.

11 Q. Is your answer the same with respect to
12 the FN303 launcher?

13 A. Yes.

14 Q. The term that I've seen in some of your
15 training materials is riot control agents. Is that
16 a term that the City of Portland uses to define a
17 certain -- certain crowd control weapons?

18 A. Riot control agents is referred to in
19 Directive 1010. I don't believe there's a
20 definition of riot control agent in Directive 1010,
21 but there are authorized uses of riot control
22 agents.

23 A riot control agent would refer to CS
24 gas, pyrotechnic OC munitions and then also OC or CS
25 vapor munitions.

1 Also, you know, just the practical how you would use
2 the tool, make it function properly, deploy it
3 safely.

4 So you know, I can't answer that question
5 in a straightforward manner. Training around the
6 use of force is an ongoing body of knowledge and we
7 don't expect an instructor to deliver all of that
8 training material again in a window of time for the
9 FN303 or the 40-millimeter or distraction devices,
10 if that makes sense.

11 Q. Sure, but what I'm trying to understand
12 is, before arming members with these specific weapon
13 systems, what they were taught with respect to, you
14 know, the appropriate use of those weapon systems
15 under the law.

16 And what I see on the schedule is on Day 1
17 from 0800 to 0845, there's three things listed and
18 one of them is policy and procedure legal Graham
19 Standard.

20 And I'm -- so I assume that sometime
21 between 0800 and 08500, there's specific instruction
22 to those new grenadiers and supervisors with respect
23 to how the Graham Standard applies to these new
24 weapons systems that they're learning about, and I'm
25 wondering beyond that, is there any other specific

1 **instruction during this three days on that topic?**

2 A. You know, the schedule is built out to try
3 and structure the training. It doesn't mean the
4 conversations around those topics are exclusive to
5 those time slots. That topic may come up again
6 during other time slots, because a question was
7 asked or training goes in that direction and a
8 member -- an instructor decides that a refresher of
9 that material or a reminder may be appropriate based
10 on what they're observing.

11 So I can't answer and say it's exactly
12 this amount of time. And again, a lot of that
13 direction and training is, remember this is what
14 Directive 1010 says. This is the training you've
15 already received on the use of force or the Graham
16 Standard and this is how it may interplay with the
17 use of this tool in these circumstances.

18 Q. Would you look at the -- the slide that's
19 on 110 982 that is headlined, "Legal 9th Circuit
20 Court"?

21 A. Yes.

22 Q. Okay. So that looks like it starts about
23 three pages specifically discussing cases where
24 courts have interpreted whether or not a specific
25 use of force was within the Graham Standard or not.

1 Is that what you're looking at as well?

2 A. Yes.

3 Q. On the second page, the second bullet

4 point reads, "Use of pepper spray to compel

5 compliance by anti-logging protestors was a

6 reasonable use of force. Federal trial judge rules

7 that no reasonable jury could view its use in these

8 circumstances as excessive force," and it gives a

9 cite to this Headwaters Forest Defense case; do you

10 see that?

11 A. Yes, I do.

12 Q. So is that part of what the new grenadiers

13 in January of 2019 and the new supervisors in

14 January 2019 were trained was the law that they had

15 to apply?

16 A. So this series of slides is really

17 designed to, you know, make grenadiers and

18 supervisors aware that some of the tools and weapons

19 that are used during crowd control have been

20 evaluated by courts.

21 It is not meant to be an extensive or

22 comprehensive training on current case law that's

23 delivered by generally our city attorney's office

24 during bureau training and in-service or legal

25 updates. It's more of an awareness-level training

1 that there is -- there are times where these tools
2 are examined by the court as to the reasonableness
3 --

4 Q. In this presentation, these officers were
5 told that the use of pepper spray to compel
6 compliance by these protestors was a reasonable use
7 of force, that a court had held that; right?

8 A. Yes.

9 Q. Is the City aware that this District Court
10 opinion was overturned by the 9th Circuit?

11 A. I have become aware of that, yes.

12 Q. Okay. Since becoming aware of it, has the
13 city done anything to correct any misapprehension
14 that existed among its members as a result of this
15 training?

16 A. I became aware of it yesterday, so no.
17 Other than to say that the Rapid Response Team
18 currently no longer exists and any reconstitution of
19 the Rapid Response Team and any training associated
20 with that will go through a new vetting process to
21 make sure it is in compliance with current case law
22 and directives.

23 Q. What vetting process did -- did this
24 presentation go through?

25 A. It was put together by our instructors and

1 It does not mean that you can use force
2 that would not otherwise be authorized, but the
3 overall reasonableness of that decision has
4 different factors.

5 **Q. And what specific factors do you train new**
6 **RRT members to consider when they're considering a**
7 **particular use of force?**

8 **A. So again, we don't -- there is no way to**
9 **capture every, single factor that they should**
10 **consider. That's -- what we train them to do is to**
11 **understand the nuances and the differences of**
12 **operating in a crowd environment and to be able to**
13 **articulate those factors or what their**
14 **considerations are.**

15 **Some common factors that we see are, you**
16 **know, limited resources. So on your typical patrol**
17 **operations call for service, you're likely to have**
18 **two or three or potentially, you know, a dozen**
19 **police officers dealing with one or two subjects who**
20 **are, you know, who are being arrested, who force may**
21 **have to be used on. That allows for different**
22 **tactics in different ways of resolving that**
23 **situation or de-escalating it.**

24 **Compared to a crowd setting where you may**
25 **have 12 or 15 officers dealing with a crowd of**

1 several hundred. That's just a different dynamic
2 and ultimately the force that they apply to each
3 person must be authorized and Constitutional, but
4 their ability to deploy alternative tactics and de-
5 escalate or disengage in different ways may be
6 different.

7 Things like governmental interest. You
8 know, the necessity to defend a piece of critical
9 infrastructure or something like that may be
10 different in a crowd setting if we believe that
11 people in that crowd want to damage critical
12 infrastructure. It may be a different
13 prioritization than, you know, vandalism to an
14 individual business. So there's different
15 considerations, but we can't -- we can't capture all
16 of the different Graham factors that may be present
17 in someone's decision-making process. We just try
18 to help them understand the need to consider those
19 things and articulate them when justifying their use
20 of force.

21 Q. The members that you -- that get selected
22 for RRT, are they likely to have deployed in some
23 sort of protest crowd control setting prior to
24 joining RRT?

25 A. Not necessarily.

1 aggression.

2 Q. I think it's -- well, I'll leave out the
3 commentary, but what I want to understand is how the
4 bureau trains to apply those two definitions in
5 crowd control situations, if a person in a crowd is
6 given a directive to move and they don't move, they
7 stand there, is that -- does the bureau train that
8 that is physical resistance that authorizes the use
9 of pepper spray or aerosol restraint?

10 A. So the short answer is no. The longer
11 answer is, we train two directives. Directive 1010
12 defines physical resistance and it talks about the
13 Graham Standard. It talks about, you know, all the
14 different factors.

15 The authorization is for physical
16 resistance or demonstrating the intent to engage in
17 physical resistance. A member's subjective belief
18 that a person is going to engage or show the intent
19 to engage in physical resistance, it's subjective,
20 so they're going to articulate that or be required
21 to articulate that, but it's also going to have to
22 be objectively reasonable.

23 So I'm going to have to be able to look at
24 that articulation and believe that it is objectively
25 reasonable that they believed the person intended to

1 engage in physical resistance in order for them to
2 have followed Directive 1010.

3 Q. Let's -- maybe this would be a little more
4 fruitful if we looked at some of the training
5 materials on this subject. Hang on one second.

6 MS. SHEFFIELD: Jesse, we're about an hour
7 in. I was thinking we could take a break, but would
8 it make sense before or after we take a look at
9 these? I'm not sure how long --

10 MR. MERRITHEW: Yeah, sure. This is a
11 good time from my perspective if it works for
12 everybody.

13 THE VIDEOGRAPHER: Please stand by. The
14 time is 10:25 a.m., and we are off the record.

15 (WHEREUPON, a recess was taken.)

16 THE VIDEOGRAPHER: Ms. Court Reporter, are
17 you ready? Please stand by. We are on the record.
18 The time is 10:41 a.m. You may now proceed.

19 MR. MERRITHEW: Thank you.

20 BY MR. MERRITHEW:

21 Q. Lt. Schoening, I was about to ask you some
22 questions about the -- the various definitions that
23 the city uses in 1010 and how those apply to crowd
24 control situations, but I realized that I didn't
25 finish asking you about the discretion that various

1 1010 and generally speaking, if a grenadier or
2 supervisor is going to be using a rubber ball
3 distraction device independently without
4 coordination from the incident commander or specific
5 direction from the incident commander, it's going to
6 be an exigent circumstances to defend the member or
7 others from physical injury or as part of that
8 general authorization by the incident commander to
9 disperse a crowd, if they encounter a level of
10 resistance or active aggression that presents some
11 risk of injury or life safety concerns that can't be
12 mitigated some other way.

13 **Q. So if I'm understanding the way that the**
14 **city trains the meaning of 1010 to its members and**
15 **what they're required to follow as a result of that,**
16 **is that the -- when it comes to the purpose being**
17 **crowd dispersal instead of any other purpose that**
18 **they might have, they only use rubber ball**
19 **distraction devices and riot control agents at the**
20 **direction of incident command?**

21 **A. As part of the -- so the dispersal would**
22 **be directed by the incident commander. A member's**
23 **decision to use a rubber ball distraction device as**
24 **part of the effort to accomplish that dispersal**
25 **would be the individual grenadier or supervisor's**

1 decision and they would have to comply with

2 Directive 1010.

3 Q. All right. So -- let me try and
4 understand what you're saying, because I'm getting a
5 little lost in there.

6 If -- when incident command gives the
7 direction to disperse a crowd to the RRT members on
8 the ground, is it -- if there's no further
9 authorization from incident command that riot
10 control agents are authorized for their use, do you
11 -- does the city train the RRT members that they
12 cannot use those RRT -- those riot control agents
13 absent some exigent circumstances in the dispersal?

14 A. They would have to justify the use under
15 Directive 1010.

16 Q. So -- but 1010 says that the riot control
17 agents can be used in a crowd dispersal if
18 authorized by incident command; am I understanding
19 that correctly?

20 A. Yes.

21 Q. Okay. So what I'm trying to understand
22 is, if incident command doesn't specifically say
23 riot control agents are authorized, then they have
24 to have some other authorization under 1010 in order
25 to use them; is that right?

1 A. Yes.

2 Q. All right. Okay. And with respect to the
3 pyrotechnic riot control agents, how -- how do you
4 train the grenadiers as to when to use those?

5 Let me explain what I mean. Are they
6 trained that they just use them at the direction of
7 incident command where incident command says, "Okay,
8 I want you to deploy pyrotechnic CS gas in this
9 direction at this time, go." And they just do what
10 they're told.

11 Or is it, are they trained that they are
12 given an authorization based on the conditions that
13 the incident command is observing, and it's then
14 just at their discretion as to whether and when to
15 deploy pyrotechnics -- pyrotechnic or riot control
16 agents?

17 A. So the overall authorization would come
18 from the incident commander and the officer, the
19 grenadier or supervisor actually deploying
20 pyrotechnic RCAs or any other type of force, also
21 has to justify the use of that force themselves.

22 So they would have to articulate based on
23 Directive 1010 which covers not only specific
24 authorizations, but you know, the Graham Standard
25 and constitutional force, and in all those factors,

1 they'd have to be able to articulate and justify
2 that deployment of a riot control agent under
3 Directive 1010, if that answers your question.

4 It's authorization from incident
5 commander, but also they still have to justify and
6 articulate it, their individual decision to use the
7 agents.

8 Q. Okay. And so in other words, the way that
9 the grenadiers are trained, they -- they need that
10 authorization from incident command, but then they
11 also need to be able to either observe or hear or
12 have information from their own sources that causes
13 them to believe that the use of it is justified
14 before they deploy. Is that what you're saying?

15 A. Yes.

16 Q. And so I guess what that -- if I'm
17 understanding this correctly, what that means is
18 that the way these grenadiers are trained, they
19 could be authorized by incident command to use riot
20 control agents, particularly pyrotechnic riot
21 control agents, and not deploy them at all, because
22 they don't see the justification themselves.

23 A. Yes, that's fairly common.

24 Q. Okay. I want to go back to the topic that
25 we left off at before the break and try and find out

1 how the bureau trains its members on these different
2 definitions within 1010 and how they apply it to
3 crowd control operations.

4 And what I'm looking at, and I'd like to
5 ask you some questions about, is a PowerPoint
6 presentation. The slide I'm looking at starts at
7 Bates Number 110 257. It's -- the title of it from
8 the first line that I have is, "Advanced Academy
9 Crowd Control Theory Class 102." I don't have a
10 date to help you on where that is. I think it's
11 2019.

12 A. You said 110 257?

13 Q. Yeah, that's the specific slide.

14 A. Yes. I see that slide.

15 Q. Okay, great. Let me get back there. All
16 right. I assume from the title of this presentation
17 that this is part of the training that all bureau
18 members receive during the Advanced Academy that you
19 described earlier as a two-part class; am I assuming
20 correctly?

21 A. Yes.

22 Q. Okay. And there's a series of slides, I
23 guess that actually begins with 256, and then
24 there's 257, 258, 259, 260, 261, that just have
25 photographs of various protest scenes; some labeled,

1 some not. Can you explain what the use of these
2 photographs is in the training process?

3 A. So it's designed to discuss in general
4 different levels of behavior you might observe, but
5 also to get members to start thinking about how they
6 can articulate what they're seeing and how that
7 would affect their decision-making process and also
8 article if they are taking actions, police actions,
9 their rationale for doing so.

10 Q. Okay. The first slide there on 256, is a
11 photograph of a barely subdued looking crowd of
12 people that -- that is labeled as compliant; do you
13 see that?

14 A. I do.

15 Q. And so with that label as compliant, is
16 the purpose of showing the photograph in that
17 discussion to train members that when they see
18 crowds that appear this way that, that doesn't meet
19 the definition of any of the authorizations for use
20 of force under 1010?

21 A. It's not just about justifying the use of
22 force. It's about, you know, recognizing crowd
23 dynamics and understanding a little bit about crowd
24 behavior.

25 We discussed, you know, a number of things

1 around crowd psychology, crowd behavior, and so it's
2 about looking at a crowd and really observing what's
3 going on and then incorporating that in your
4 decision-making process, whatever that decision-
5 making process is leading to, whether it's an
6 arrest, a use of force, you know, decision to
7 communicate with the crowd or to disengage from the
8 area from the crowd. But ultimately, yes, it can
9 also just cover the use of force.

10 **Q. The next slide actually has the words**
11 **passive resistance on it, and then what looks to be**
12 **the bureau's definition of passive resistance which**
13 **is a person's non-cooperation that does not involve**
14 **violence or other active conduct by the individual;**
15 **do you see that?**

16 A. I do.

17 **Q. And the photograph, it's a bit blurry on**
18 **my copy, but it looks like there's an individual who**
19 **is sitting cross-legged in front of the line of**
20 **police officers who have long batons and helmets and**
21 **face shields and it looks like some level of PPE**
22 **protection.**

23 **So what is the bureau trying to train and**
24 **communicate with this photograph?**

25 A. So a couple of things. One is that, you

1 know, it does talk about passive resistance, which
2 is the definition in Directive 1010 which discusses
3 the use of force and authorizations for the use of
4 force, but again, it's also on the context of
5 general crowd behavior.

6 It's fairly common to encounter activists
7 or folks in the community who believe civil
8 disobedience or engage in passive resistance or just
9 -- like I said, civil disobedience and it's a fairly
10 common protest tactic, so it also just kind of
11 covers that as well.

12 Q. Okay. And so specific to the individual
13 who is sitting cross-legged, appears to be in the
14 middle of the street in this photograph, does the
15 bureau train its members at least with the
16 information that you have in front of you in the
17 photograph, this person appears to be engaged in, at
18 best, passive resistance and not any type of
19 physical resistance or active aggression?

20 A. Yes.

21 Q. The next slide is not labeled and that's
22 at 110 258. That appears to show a scene where the
23 police officers are in a line and similar type of
24 equipment as the prior photograph and there's three
25 individuals who are sitting cross-legged in the

1 street, joining hands. A couple of them have it
2 looks like ear protection available, and at least a
3 couple of them appear to be either yelling or
4 singing or doing something boisterous with their
5 voices.

6 Could you tell us what the bureau trains
7 its members to try and recognize and evaluate in
8 this photograph?

9 A. So again, it's a type of, you know,
10 activity you may see in a protest or demonstration.
11 They're clearly sitting, it appears, on the street,
12 intentionally on some white rail tracks. It would
13 be most likely some kind of civil disobedience and
14 as it relates to Directive 1010, you know, they're
15 not engaged in certainly active aggression.

16 They may, depending on what else is
17 happening in the context of this situation, be
18 demonstrating the intent to engage in physical
19 resistance, but you know, it's just a picture and --
20 we use the pictures to try and start the
21 conversation, but it's a conversation that
22 acknowledges. You can't take a still frame of a
23 picture and necessarily use that in isolation to
24 make a decision. You're going to have to -- it's an
25 exercise to help them articulate what they're

1 seeing, how that would mesh with the decision-making
2 process and steer that decision-making process.

3 Q. So when you're training with a photograph
4 like this, you know, your testimony was that there's
5 nothing within the photograph itself that overtly
6 indicates an intent to engage in physical
7 resistance, what types of things are you training
8 the members to look for that's not captured in this
9 photograph that might make this a situation where
10 there -- there is an intent to engage in physical
11 resistance?

12 A. So we would tell members, you know, a lot
13 of it is verbal, what they're saying, what they're
14 telling you. You can't capture that in a photograph.
15 They may be telling you they're going to resist your
16 efforts to disperse them or arrest them. We're not
17 saying this picture does indicate that. We're
18 saying, you know, there are other factors besides
19 what you see. Things like locking hands or locking
20 arms, could indicate some intent to resist your
21 efforts to arrest people or disperse them, but none
22 of those factors can be taken in isolation. It's
23 the totality of the circumstances in any decision-
24 making process, including the use of force.

25 Q. So in contrast to the photograph before

1 where there's a single individual who is seated on
2 the street with his arms -- or his legs crossed or
3 their legs crossed, which I think you said fairly
4 unequivocally was not -- was passive resistance,
5 where is the line between passive resistance and
6 physical resistance?

7 How does the -- how does the bureau train
8 its officers where that line is?

9 A. We define it in Directive 1010.

10 Q. Okay.

11 A. And I can read the definitions again.
12 Passive resistance is a person's non-cooperation
13 with a member that does not involve violence or
14 other active conduct by the individual.

15 And then physical resistance is a person's
16 physical attempt to evade a member's control that
17 does not rise to the level of active aggression.

18 Q. So I assume that the bureau, you know,
19 trains its members as to how to approach individuals
20 like the individuals in this photograph, when
21 they're directed to remove them from the street; is
22 that -- is that a fair assumption?

23 A. Yes.

24 Q. Okay. So if they're directed to remove
25 the individual who is seated in slide 257, the

1 passively resisting person cross-legged in the
2 street, is -- does the bureau train that anything
3 beyond say going limp and allowing the officers to
4 move them or put them in handcuffs is physical
5 resistance?

6 A. I'm sorry. Ask that again, please?

7 Q. Yeah, I'm trying to understand. So the
8 definition that the bureau trains for physical
9 resistance says, "other active conduct." And I'm
10 trying to get at, you know, how the bureau trains,
11 what that might look like in a crowd control
12 situation.

13 So if you've got a person who is -- you
14 know, apparently non-violent sitting in the street,
15 and an officer or group of officers is tasked with
16 removing them one way or the other, either arresting
17 or simply removing them from the street, what --
18 what actions on behalf of that individual would
19 constitute what the bureau trains as other active
20 conduct, that means physical resistance? Is it
21 anything that they do with their body?

22 A. No.

23 MS. SHEFFIELD: Objection. It misstates
24 1010.

25 THE REPORTER: I'm sorry, Ms. Sheffield.

1 Could you please repeat your objection.

2 **MS. SHEFFIELD:** I object to the premise
3 misstates the definition of physical resistance in
4 1010.

5 **BY MR. MERRITHEW:**

6 **Q.** You can go ahead, Lieutenant. It sounded
7 like you were beginning to say no, that's not
8 enough, but I don't want to put words in your mouth.

9 **A.** So I think the definition is pretty
10 clearly capture that for physical resistance there
11 has to be active conduct. The definition itself
12 talks about a physical attempt to evade a member's
13 control that does not rise to the level of active
14 aggression.

15 So moving their body is not necessarily
16 physical resistance. If the member articulates that
17 the way they're moving their body, the way they are
18 engaging in active conduct, is attempt to evade a
19 member's control, that would meet the definition of
20 physical resistance.

21 So if you pull away from me, if you flee
22 from me, active attempts or active conduct to evade
23 that control, that's physical resistance and that's
24 what we teach our members.

25 **Q.** Okay. And what about intent to engage in

1 **physical resistance? I mean, when you're looking at**
2 **that next slide and having these trainings and**
3 **discussions about the various factors, you know, if**
4 **these individuals are loudly chanting, "Hell no, we**
5 **won't go," is that something that you train is**
6 **sufficient to conclude that there's an intent to**
7 **engage in physical resistance?**

8 A. We never train that there is, you know,
9 there's a black and white, here's the line where
10 force is authorized. There's directives that we
11 train. There's definitions we train. There are
12 authorizations to try to capture when it's
13 appropriate and allowed to use force. Directive
14 1010 talks a whole -- about a whole lot more other
15 things beyond just authorization to use force. It
16 talks about de-escalation. It talks about you know,
17 other things to try to avoid the use of force, so
18 you know, individual things that a member observes
19 or hears or perceives may add to that cumulative
20 decision-making process and that may include verbal
21 statements like, "Hell no, we won't go," or
22 profanity, telling a member to F off or whatever it
23 is, but that by itself doesn't trigger the
24 authorization to use force.

25 The definitions and directives outline the

1 authorizations to use force, and a member is
2 required to explain how what they perceived, what
3 led them to that believe that force was authorized.

4 Q. Your answer to that question leads us to
5 the next slide, which is in 259, 110-259 which is
6 labeled "Active Resistance." And it says a person's
7 physical attempt to evade a member's control that
8 does not rise to the level of active aggression
9 which -- isn't that the definition of physical
10 resistance from the directives?

11 A. The definition of physical resistance is
12 -- yes, let me look at it again. Yes. That is the
13 definition of physical resistance.

14 Q. Okay. I assume that because that is the
15 definition of physical resistance from the
16 directives, this slide was meant to -- as a training
17 tool to try and help members understand the
18 directive definition of physical resistance not
19 active resistance as the slide states; is that
20 right?

21 A. That is correct.

22 Q. Okay. Now what are the things that you're
23 training members bureau members to recognize in this
24 photograph that might amount to meeting the bureau's
25 definition of physical resistance?

1 A. I'm sorry. Was that a question?

2 Q. Yes.

3 A. So again, the slide is not in isolation
4 meant to say this is an authorization to use force.
5 It's an exercise in observing crowd behavior,
6 individual actions within the crowd, articulating
7 what members are observing and having them explain
8 how that affects the decision-making process,
9 including potentially a decision to make an arrest
10 or use force.

11 The authorization under Directive 1010 for
12 aerosol restraints which is around physical
13 resistance is -- it demonstrates physical resistance
14 or the intent to engage in physical resistance.
15 This slide can help members articulate or explain
16 what they might be seeing, you know, the middle
17 finger, the posturing.

18 It appears to me that she is yelling. The
19 assumption would be that that is towards police
20 officers, but again, in isolation this picture does
21 not tell members they're authorized to use force, if
22 they see this in front of them. It's, explain what
23 you're seeing, how you articulate it, how it meshes
24 with directives and your decision to take action or
25 not to take action in response to what you're seeing

1 or observing.

2 Q. So the things that -- you're trying to
3 train the members to recognize from this, or to
4 discuss and help them to understand the definition
5 of physical resistance or things like, the posture
6 of the woman who is front and center, the fact that
7 she's got both of her middle fingers up in either
8 direction and trying to assess what that means; is
9 that right?

10 A. Yes.

11 Q. Two slides from there is 110 261 where it
12 has the definition of active aggression and it looks
13 like a person who is probably not a police officer,
14 swinging what appears to be a club or a bat at a
15 police officer who is on the ground, and it looks
16 like he's about to strike the officer who is on the
17 ground with this weapon.

18 What are you trying to train with this
19 slide?

20 A. Again, just to -- it's an exercise to get
21 members to start articulating or to be able to
22 articulate what they're seeing and how that would
23 line up with their decision-making process.

24 You know, it does appear to show active
25 aggression, but again it's just a photograph. I

1 mean, you can't rely on that by itself to make any
2 decision.

3 Q. Okay. Would you agree that there's a
4 pretty big jump in terms of conduct from the slide
5 teaching physical resistance to the photograph of
6 the active aggression where you know, somebody about
7 to commit a felony, assaulting a public safety
8 officer, potentially seriously injuring that officer
9 and somebody who's got both of her middle fingers up
10 and shouting at somebody?

11 A. Yes.

12 Q. So what particular factors are you
13 training members to consider when recognizing the
14 differences between active aggression and physical
15 resistance?

16 A. So we train them to the directives. So
17 again, you know, physical resistance and active
18 aggression are defined in Directive 1010, and you
19 know, what we train members to do is to receive the
20 situation, look at things, listen to things,
21 articulate what they're seeing, what they're
22 hearing, what they're feeling, and explain why they
23 made the decision they did and why that decision
24 winds up with directives to cover their conduct as
25 members of the police bureau, and this is -- these

1 are just a handful of slides, but you know, you
2 could look at endless slides to have members try to
3 articulate what they're seeing or perceiving in
4 those events.

5 We train a whole lot around the use of
6 force. The Training Division trains a whole lot
7 around the use of force. The Rapid Response Team
8 trains around the use of force. These slides are
9 not the only material we talk about when it comes
10 to, you know, articulating and justifying police
11 actions.

12 Q. The -- is there anything specific that you
13 train either RRT members or bureau members generally
14 about how a crowd's failure to disperse when there's
15 an order to disperse interacts with these
16 definitions under 1010 of passive resistance,
17 physical resistance, and active aggression?

18 A. So we train that, you know, there are some
19 types of force that are indiscriminate, and if the
20 -- the incident commander authorizes the use of, for
21 example, a pyrotechnic riot control agent, based on
22 the totality of the circumstances, the declaration
23 of a civil disturbance or a riot, the grenadiers
24 are still going to have to make the individual
25 evaluation of whether that direction comports with

1 you're less likely to be perceived as the out-group
2 and you're more likely to get compliance or to de-
3 escalate and avoid force when, you know, their goals
4 conflict our goals, which are usually to establish
5 -- re-establish order or you know, adjust criminal
6 behavior.

7 So they use their mouth. They talk. They
8 communicate and then you know, we also talk about,
9 you know, giving time. If you have the ability and
10 it's feasible, giving them time to kind of work
11 through the stages of not wanting to comply with the
12 direction of the orders, make sure it's clear, they
13 have time to understand what's being asked of them
14 or what they're being directed to do, if possible.

15 And then again, you know, try to avoid
16 individual actions where possible, because of the
17 potential for miscommunication or perception that
18 what we're doing is illegitimate or inflammatory.

19 So we recognize that and train our members
20 to try to avoid that when possible.

21 **Q. Do you have a PowerPoint slide**

22 **presentation that begins at 128 521 in any of your**
23 **binders?**

24 **A. Are we in 2019 or --**

25 **Q. I don't think so. I don't know the date.**

1 It's not listed on the presentation. I -- I think
2 it was produced in a batch later on which were
3 represented to be 2017 or '18. Let me see if I can
4 figure it out.

5 MS. SHEFFIELD: It's going to be in 2018,
6 so say the number one more time, Jesse?

7 MR. MERRITHEW: Yeah, 128 521.

8 BY MR. MERRITHEW:

9 Q. The first slide is, "Protests and Riots."

10 MR. MOEDE: It's 2018. It's Scott Moede
11 for the City of Portland.

12 MS. SHEFFIELD: Yeah, it's going to be in
13 the state basic.

14 BY MR. MERRITHEW:

15 A. Yeah, I see a slide.

16 Q. This looks to be a part of the effort that
17 you're describing in order to help members
18 understand these theories of crowd behavior; is that
19 accurate?

20 A. Part of it, yes.

21 Q. When and to whom was this presentation
22 given?

23 A. This appears to be part of the material
24 provided at the state basic RRT MRT Course.

25 Q. Okay. I want to ask you about the very

1 last slide in this presentation, which is at 128

2 630?

3 A. Yes.

4 Q. Could you explain how that slide is

5 consistent with the theories of crowd management

6 that the rest of the presentation was meant to

7 address?

8 A. It is inconsistent and it's unacceptable.

9 Q. Okay. Do you -- was it a -- do you know

10 how this slide is -- came to be in this

11 presentation?

12 A. I do not.

13 Q. Would you agree that this slide undermines

14 a lot of what you just described the city trying to

15 teach members about crowd dynamics and in-crowd out-

16 crowd and building rapport in order to avoid the use

17 of force?

18 A. Yes, absolutely.

19 Q. In terms of the training with respect to

20 documentation of uses of force, does the city train

21 that each use of force that a member uses must be

22 documented in a -- I forget what their form is

23 called now. But some sort of documentation of the

24 use of force -- force data collection report.

25 Sorry.

1 transcript, but that looks like that was already
2 going.

3 **THE REPORTER:** Mr. Merrithew, you do want
4 to order the original and Ms. Sheffield, would you
5 like to purchase a copy as well?

6 **MS. SHEFFIELD:** Yes, I would.

7 **THE REPORTER:** Okay.

8 **THE VIDEOGRAPHER:** And, counsel, Ms.
9 Albies will be getting today's video deposition
10 included in her fee. Would any other counsel member
11 like a copy of today's video deposition.

12 **MR. MERRITHEW:** No.

13 **MS. SHEFFIELD:** No.

14 **THE VIDEOGRAPHER:** Okay. The time is
15 12:33 p.m. and we are off the record.

16 **(WHEREUPON, the deposition of FRANZ**
17 **SCHOENING was concluded at 12:33 p.m.)**

CERTIFICATE

I, the undersigned, Vincent Guerrero, am a videographer on behalf of NAEGELI Deposition & Trial. I do hereby certify that I have accurately made the video recording of the deposition of Franz Schoening, in the above captioned matter on the 23rd day of September, 2021, taken at the location of 1111 SW 2nd Ave, Portland, Oregon 97204.

No alterations, additions, or deletions were made thereto.

I further certify that I am not related to any of these parties in the matter and I have no financial interest in the outcome of this matter.



Vincent Guerrero

CERTIFICATE

I, Rachael McCarrel, do hereby certify that I reported all proceedings adduced in the foregoing matter and that the foregoing transcript pages constitutes a full, true and accurate record of said proceedings to the best of my ability.

I further certify that I am neither related to counsel or any party to the proceedings nor have any interest in the outcome of the proceedings.

IN WITNESS HEREOF, I have hereunto set my hand this 22nd day of October, 2021.

A handwritten signature in dark ink, appearing to read 'RMc', is written over a horizontal line.

Rachael McCarrel